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No. 85-1444

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

THE ALLEN GROUP, INC., and
ORION INDUSTRIES, INC.,

Petitioners,

vs.

ROY A. FRICKE and
ELCO INTERNATIONAL, LTD.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Abbreviations

'155 refers to U.S. Pat. No. 4,062,155

'144 refers to U.S. Pat. No. 4,203,141

"Pet. App. ___" refers to the particular Appendix portion of Petitioners' Petition

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Respondents herein oppose the issuance of a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Federal Circuit entered August 1, 1985, affirming the Judgment of the United States District Court for the Central District of California.

Stripped of the unfounded accusations leveled at both the CAFC panel that decided the present case and the CAFC generally, it is clear that Petitioners have absolutely no real basis, either in fact or in law, to contend that the "lost profits" basis for computing damages was improperly applied in the present case with respect to its blatant and cavalier infringement of the patents at issue. Indeed, Petitioners simply have not nor

are capable of presenting the requisite "special and important reasons" for the granting of review in this case required by Rule 17 of this Court.

I. STATEMENT OF THE CASE

The present case involves two of Respondents' several patents covering particular kinds of spark plug cleaner products. With regard to one of these inventions, Petitioners, as well as virtually the entire automotive aftermarket industry, recognized the merits of Respondents' invention and corresponding product covered by U.S. Pat. No. 4,062,155 and blatantly copied it. This particular spark plug cleaner design clearly became the "standard" of the automobile aftermarket industry for such do-it-yourself spark plug cleaner products. A second, less successful design

of Respondents, covered by U.S. Patent No. 4,202,141, was also copied by Petitioners.

Between May 27, 1981 and June 21, 1981, the liability portion of the present action for willful and deliberate patent infringement was tried. The District Court reserved the ultimate determination of the issues of non-obviousness and validity of U.S. Pat. No. 4,062,155 and U.S. Pat. No. 4,202,141 (hereinafter referred to as the "'155" and "'141" patents respectively) to itself. It was agreed that the jury's verdict as to the validity of the patents at issue would be advisory.

The jury was fully instructed under the applicable law concerning the requisite Graham v. John Deere Co., 383 U.S. 1 (1966) obviousness analysis and the other

validity issues as well as the law of infringement. All parties agreed to the form and content of the Special Interrogatories submitted to the jury on the issues of validity and infringement. The jury rendered interrogatory responses finding both the '141 and '155 patents valid and infringed, willfully and deliberately, by the Petitioners.

The trial on the issue of damages was then conducted from July 8, 1981 to July 23, 1981. Respondents had presented substantial cost, pricing and capacity evidence, and further requested respective sums certain, as "lost profits" for infringement of the '155 and '141 patents--in amounts substantially in excess of those ultimately returned by the jury.

The jury was thoroughly instructed on the issue of patent infringement damages, as to the basis for selection and calculation of an award based upon either a "lost profits" theory or a "reasonable royalty" theory. Petitioners collaborated with the submission of jury instructions on the issue of "lost profits" calculation of damages and in addition, further stipulated to the form and content of the Special Interrogatories submitted to the jury on the damages issues. The jury, expressly found that Respondents were entitled to their "lost profits" and specifically, the conservative award of $1.32 per unit for infringement of the '155 patent and $1.47 per unit for infringement of the '141 patent.

On September 6, 1983, the District

Court issued its own Findings of Fact and Conclusions of Law on, among other things, the issue of the non-obviousness of the claimed subject matter of the '155 and '141 patents, which significantly altered the proposed post-trial findings and conclusions submitted by the parties.

On September 28, 1984, the District Court denied the numerous and extensive post-trial motions of Petitioners. Thereafter, on November 30, 1984, the District Court entered the SECOND AMENDED JUDGMENT (which deleted former Defendant K-MART, who had settled out of the case during the pendency of the post-trial motions) assessed damages solely against Petitioners based upon the number of respective infringing units sold only by Petitioners, and further assessed costs and prejudgment interest against Peti-

tioners.

Petitioners then appealed the final judgment of the District Court to the Court of Appeals for the Federal Circuit with respect to only the issues of:

1. Whether claims 2, 3, 6, 7 and 8 of Fricke Pat. No. 4,062,155 are invalid for obviousness under 35 U.S.C. § 103.

2. Whether the trial court abused its discretion by denying Defendants' Motion for New Trial based on the jury's holding that the proper measure of damages should be Plaintiffs' lost profits rather than a reasonable royalty.

Following extensive briefing and oral argument, on August 6, 1985 the Court of

Appeals for the Federal Circuit rendered its opinion affirming the final judgment of the U.S. District Court for the Central District of California holding that the '155 patent was valid and infringed as well as, affirming the propriety of the award of damages for infringement of the patents at issue on the basis of lost profits. (Pet. App. 2).

Petitioners then filed their Petition for Rehearing with the Court of Appeals, which was subsequently and properly denied in its entirety on December 2, 1985, with the exception of some clerical modifications. (Pet. App. 3).

Lacking any legal or factual basis whatsoever for the present request for granting of a Writ of Certiorari, Petitioners blatantly seek to transparently "bait" this Court into improperly

granting certiorari, to further delay the payment of "lost profits" damages for its willful and deliberate acts of patent infringement of Respondents' '155 and '141 patents--unlawful acts committed years ago and which have served to virtually destroy Respondents in the interim, both physically and financially.

II. PETITIONERS ARE NOT ENTITLED TO THIS COURT'S WRIT OF CERTIORARI

In the complete absence of any bona fide basis for issuance of this Court's Writ and grant of review, Petitioners instead attempt to ridicule and falsely impute incompetence to the Court of Appeals for the Federal Circuit while questioning its integrity, attempt to completely fabricate some sort of void or inconsistency in the CAFC'S case law, and attempt to falsely impute purported CAFC defiance against this Court's precedents

on the issue of "lost profits" patent infringement damages--where no such incompetence, void, inconsistency or defiance even remotely exists.

A. The CAFC Has Consistently Relied Upon and Applied the "Lost Profits" Law of this Court

Petitioners contend that this Court should grant certiorari in order to direct the CAFC to follow the applicable "lost profits" law developed by this Court, rather than to purportedly permit the CAFC to continue the development of its own supposedly confusing body of "lost profits" law. (Petitioners' Brief at p. 10). Yet, contrary to what Petitioners would have this Court believe, the CAFC opinions concerning the award of "lost profits" damages pursuant to 35 U.S.C. § 284 have consistently followed and are entirely in harmony with this

Court's paramount decision in Aro Mfg. Co. v. Convertible Replacement Co., 377 U.S. 476, 507 (1964) which held:

> They [lost profits damages] have been said to constitute "the difference between his pecuniary condition after the infringement, and what his condition would have been if the infringement had not occurred." Yale Lock Mfg. Co. v. Sargent, 117 U.S. 536, 552 (1886). The question to be asked in determining damages is "how much had the Patent Holder and Licensee suffered by the infringement. And that question [is] primarily: had the Infringer not infringed, what would Patent Holder-Licensee have made?" Livesay Window Co. v. Livesay Indus-

tries, Inc., 251 F.2d 469, 471 (5th Cir. 1958).

Indeed, the CAFC has consistently followed this "lost profits" damages standard of this Court, while at most applying suggested, as opposed to mandatory, guidelines for determining whether the evidence submitted satisfies the aforementioned burden imposed upon the patentee to demonstrate what profits it would have made "but for" the infringer's sales.

For example, even prior to the creation of the CAFC, in a decision written by its present Chief Judge Howard Markey in Panduit Corp. v. Stahlin Bros. Fibre Works, Inc., 575 F.2d 1152, 1156 (6th Cir. 1978), that Court expressly quoted and followed the above-quoted language of this Court's decision in Aro and has set

forth four supplemental considerations to assist in determining whether the evidence satisfied the Patentee's burden under both Aro and Livesay, towards recovering the profits on sales that it reasonably would have made, absent the infringement. These considerations include a showing of:

> (1) demand for the patented product, (2) absence of acceptable non-infringing substitutes, (3) manufacturing and marketing capability to exploit the demand, and (4) the amount of the profit the patent holder would have made.

Panduit Corp., 575 F.2d at 1156.

The CAFC'S decisions on the issue of "lost profits" damage awards have neither strayed from the above-quoted holdings of

Aro and Livesay nor have been in any way inconsistent, in contrast to what Petitioners would have this Court erroneously believe. Specifically, the CAFC in Lam, Inc. v. Johns-Manville Corp., 718 F.2d 1056 (Fed. Cir. 1983) explicitly quotes and follows Aro and Livesay with respect to the standard to be employed in awarding "lost profits" damages.

Consistent with the Aro, Livesay and Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931) decisions that preceded it, the CAFC in Lam (which Petitioners concede was properly determined) further stressed that in proving a patent owner's damages due to infringement, the patent owner's burden of proof is not an absolute one, but rather a burden of reasonable probability. Lam, Inc., 718 F.2d at 1065.

In the next CAFC "lost profits" decision dealing with the damages issue, Central Soya Co., Inc. v. Geo. A. Hormel & Co., 723 F.2d 1573 (Fed. Cir. 1983), the CAFC also expressly quoted and relied upon Aro and Livesay, as well as General Motors Corp. v. Devex Corp., 461 U.S. 648 (1983), while reviewing the District Court's use of the aforementioned Panduit factors as further considerations for evaluating whether the patentee had sustained its burden for recovering damages for infringement in the form of "lost profits". Central Soya Co., Inc., 723 F.2d at 1578.

The Court in Central Soya, noted that the particular facts of that case involved no acceptable substitutes whatsoever (infringing or otherwise) for the patented product, which accordingly

obviated the need for the patentee to prove that any competing products which were acceptable substitutes, were additionally infringing, with respect to the claims of the patent at issue. Id. at 1579.

The CAFC'S decision in Central Soya was most certainly not inconsistent with the aforementioned holdings of this Court on the issue of patent damages. Moreover, the Court in Central Soya specifically indicated that it would not reach the issue of any possible alternative guidelines for evaluating whether a patentee sustained its burden of showing that it was entitled to a "lost profits" damages award. Id. at n.5.

Consistent with the foregoing, in Gyromat Corp. v. Champion Spark Plug Co., 735 F.2d 549 (Fed. Cir. 1984) the CAFC

acknowledged that it had "implicitly approved as a method of proving damages" the Panduit test in Central Soya and merely examined the factual record of that particular case to see whether it supported the lower Court's award of "lost profits". Gyromat Corp., 735 F.2d at 552.

Accordingly, in the aforementioned three decisions of Lam, Central Soya and Gyromat, the CAFC recognized and followed this Court's overriding legal principle governing the award of "lost profits" damages of Aro and Livesay, and applied the supplemental Panduit four-pronged test to the particular facts of each case as one means of determining whether the evidence sustained the patentee's burden with respect to receiving a patent infringement damage award in the form of

"lost profits".

Similarly, in Bio-Rad Laboratories, Inc. v. Nicolet Instrument Corp., 739 F.2d 604 (Fed. Cir. 1984), where, as in the present case at bar, the particular "lost profits" jury instruction was not challenged, the CAFC confirmed that the Panduit standard is merely one possible way to establish entitlement to "lost profits" and not the exclusive standard for determining such entitlement. Bio-Rad Laboratories, Inc., 739 F.2d at n. *.

The Court in Bio-Rad further concluded that sufficient evidence was proffered by the patent owner on the basis of the Panduit factors, to establish at least a reasonable probability that in the absence of a defendant's infringement, the patent owner or exclusive licensee would have made the infringing sales so

as to sustain the patent owner's burden--a standard fully consistent with the aforementioned Aro and Livesay standards of this Court. Bio-Rad Laboratories, Inc., 739 F.2d at 616.

Accordingly, Petitioners' contention that as of Bio-Rad, neither the District Courts nor the Patent Bar "had any idea as to what tests would be used" to deal with the "lost profits" issue, is clearly disingenuous.

The Petitioners then turn to what they termed "the post Bio-Rad CAFC lost profits decisions" in their desperate attempt to conjure up a reviewable issue, where one clearly does not exist. In fact, in Weinar v. Rollform, Inc., 744 F.2d 797, 807 (Fed. Cir. 1984), the CAFC again relies upon this Court's prior patent infringement decisions such as

Yale Lock Mfg. Co. v. Sargent, 117 U.S. 536, 552 (1886) which itself was relied upon in Aro, and which provides:

> "The measure [of patent infringement damages], when its calculation is possible, is an amount needed to return the patent owner to the position it would have occupied had there been no infringement."

Moreover, the Court in Weinar further found that there was sufficient evidentiary testimony interpretable by the jury as satisfying the Panduit factors (cited with approval in Central Soya) noting that such a four-pronged test is not the exclusive way of evaluating whether the patentee has satisfied its burden with respect to a "lost profits" damage award.

Likewise, in Paper Converting Machine

Co. v. Magna-Graphics Corp., 745 F.2d 11, 21 (Fed. Cir. 1984) the CAFC acknowledged that the Panduit test (as adopted in Central Soya), is one possible test or guideline for determining whether the patent holder can satisfy the burden set forth in Aro, to in turn reasonably show the profit that the patent holder would have made, but for the infringement--thereby being fully consistent with both the prior CAFC decisions on this issue, as well as the holdings of this Court on the subject.

The CAFC decision in King Instrument Corp. v. Otari Corp., 767 F.2d 853 (Fed. Cir. 1985) once again reemphasized the fact that the four-part Panduit test is merely one method of calculating "lost profits", while also stressing that under controlling principles of equity, any

risk of uncertainty in connection with a damage award computation must be cast upon the wrongdoer rather than upon the injured party. King Instrument Corp., 767 F.2d at 864.

Most significantly, in a decision conveniently omitted by Petitioners, Kori Corp. v. Wilco Marsh Buggies & Draglines, 761 F.2d 649 (Fed. Cir. 1985), the CAFC explicitly quotes and relies upon this Court's decision in Aro with respect to the controlling standard for patent infringement damages which is, "had the Infringer not infringed, what would [the] Patent Holder-Licensee have made?" Aro Mfg. Co., 377 U.S. at 507; General Motors Corp. v. Devex Corp., 461 U.S. 648 (1983).

Finally, in Yarway Corp. v. Eur-Control U.S.A., Inc. et al., 775 F.2d 268,

275 (Fed. Cir. 1985), the CAFC further concluded that the record in that case, supported the District Court Judge's findings awarding a "lost profits" award on the basis of the four Panduit factors cited with approval in Central Soya, so as to sustain the patentee's burden to prove that it was entitled to such an award. Specifically, the Court in Yarway found that the evidentiary records supported the patent holder's burden of demonstrating the absence of acceptable non-infringing substitutes. Yarway Corp., 775 F.2d at 276.

Accordingly, in light of the unwaivering consistency and reliance upon this Court's overriding "lost profits" damages standard as originally set forth in Aro, and the consistent non-exclusive application of the Panduit standard for

evaluating whether the patentee or patent holder has satisfied its burden with respect to that test, it simply cannot be said that any inconsistency, deviation from this Court's holdings, or any "void" in the controlling case law, exists with respect to "lost profits" damage awards in patent infringement cases. Clearly, Petitioners' cries of "consternation" among members of the judiciary and the patent bar are utter fabrications.

B. The CAFC Properly Affirmed the Use of "Lost Profits" as the Measure of Damages

Petitioners further erroneously contend that the CAFC committed what it termed "three incredible factual errors" (Petition p. 4) in affirming the use of "lost profits" as the measure of damages for Petitioners' acts of willful and

deliberate patent infringement in the case at bar. Specifically, Petitioners contend that:

* The CAFC panel initially overlooked the '141 patent in its opinion;

* The Respondents made no attempt whatsoever to prove that they would have sold the infringing spark plug cleaner sold by Petitioners so as to entitle Respondents to "lost profits"; and

* The identity of parties was miapprehended. (Petition at p. 5).

In so contending, Petitioners' arguments border on sophistry.

C. The CAFC Properly Denied Petitioners' Petition for Rehearing

Petitioners no longer contend that the District Court erred in concluding that

the claims of the '155 patent at issue were not invalid under 35 U.S.C. § 103 or that the relevant factual findings related thereto were clearly erroneous. Neither were Petitioners "denied their day in Court" with respect to their contention that the District Court abused its discretion by denying their Motion for New Trial on the issue of whether the proper measure of damages was a "reasonably royalty" rather than "lost profits."

The CAFC properly concluded that Petitioners did not sustain their burden of showing that the District Court's denial of their motion for a new trial was an abuse of discretion. As the CAFC properly concluded in denying Petitioners' Petition for Rehearing, sufficient evidence was presented for the jury's consi-

deration, with respect to such "lost profits" damages factors, such as Respondents' capability to manufacture and sell the infringing units, the costs involved with and the reasonable selling prices for both the '155 and '141 spark plug cleaners during the period at issue, the prior sales of same by Respondents, their prior exclusive licensee and the infringers, as well as the optimal profits recouped by each.

Specifically, as emphasized on appeal by Respondents, the jury was provided with competent and largely unrebutted evidence from which it deduced the lost profits sum of $1.32 per unit for infringement of the '155 patent, and $1.47 for lost profits on infringement of the '141 patent. Clearly, the jury was exposed to many witnesses and substantial

documentary evidence from all parties, concerning the factors of price, cost and profitability of the various portable spark plug cleaners at issue.

For instance, testimony included the manufacturing costs of producing the '155 spark plug cleaners during the years 1978, 1979 and 1980. In addition, Plaintiffs submitted evidence regarding the selling price of such genuine '155 units during the period in question. Moreover, other evidence submitted including changes in the selling prices for the genuine '155 units sold between 1978 and 1980; the variances in the costs of manufacturing the genuine '155 units in 1978 through 1980; the royalty payments paid to Respondents by the exclusive licensee of the '155 patent during the period in question; the sales commissions paid upon

the sale of such products, as well as testimony regarding the price errosion created by increased competition from the infringers such as Petitioners.

Likewise, Respondents testified at length concerning their manufacturing capabilities, costs, profits and expenses with respect to the '141 units, as well. All of the foregoing evidence provided ample evidence in the record to support the respective $1.32 and $1.47 lost profit per unit figures returned by the jury, which were in fact, much lower than those requested by Plaintiffs at trial, and anything but the product of passion or prejudice.

As the Court of Appeals further properly observed, Petitioners neither objected to nor otherwise contested the instructions, given to the jury for the

determination of damages or the form of the special interrogatories which properly permitted disclosure of lost profit per unit figures with respect to each of the '155 and '141 spark plug cleaners. Accordingly, Petitioners are hardly in any position whatsoever to now argue any sort of abuse of discretion on the part of the District Court or improper denial of their Petition for Rehearing on the part of the Court of Appeals.

Despite Petitioners' attempts to make it appear otherwise, the evidentiary record was replete with requisite, though hotly contested information, indeed "different sets of facts" from each party, relating to the separate and different computations required to be performed by the jury to arrive at the different lost

profit per unit figures returned with respect to the '155 patent and the '141 patent.

While the Court of Appeals' decision initially neglected to explicitly mention the '141 patent, due to the fact that Petitioners' appeal was devoted predominantly to the validity of only the '155 patent, its denial of the Petition for Rehearing, considered and dismissed Petitioners' contentions on the damages issue, while acknowledging that the basis for computing the lost profit amounts for the '155 unit and the '141 unit involved different facts by recognizing, by way of its modification of its December 2nd opinion, that Respondents alone sold the '141 patent while their exclusive licensee sold the genuine '155 unit during the years 1978 through 1980. (Pet.

App. 3).

Respondents have likewise demonstrated that they would have sold the infringing spark plug cleaners sold by Petitioners in the absence of infringement of the patents in question, by demonstrating, among other things, the additional capacity to build and sell at least the number of infringing units.

Indeed, as the Court of Appeals also properly recognized, Respondents repeatedly demonstrated at trial that any supposedly competing "acceptable substitutes" pointed to by Petitioners, were nothing more than additional blatant infringers, and it was demonstrated at trial that the '141 unit of Respondents', was <u>not</u> an acceptable substitute for the '155 unit. Indeed, it was also shown at trial that the supposed competing spark

plug cleaners in the marketplace, were nothing more than "duplicates" of the patented '155 unit, many being struck off of the exact same molds in the Orient that Petitioners utilized to manufacture their infringing units.

Hence, even though the Court of Appeals observed in passing that, depending on the facts of a case, it is not always necessary to require the patentee to establish that any supposed acceptable substitute was an infringing product, in the present case, Respondents more than satisfied their burden of demonstrating the absence of acceptable non-infringing substitutes for its '155 and '141 units in the marketplace, so as to justify the "lost profits" damage award of the jury and the District Court, which was affirmed by the Court of Appeals.

Moreover, as the Court of Appeals significantly observed, since Petitioners did not take or preserve any sort of objection with respect to the instructions presented to the jury on the damages issue, "it ill behooves" Respondents at this late date, to again argue that Petitioners somehow failed to sustain their burden of demonstrating the lack of acceptable substitutes.

Neither is there any merit whatsoever to Petitioners' contention that the CAFC somehow "misapprehended the identity of parties" and imposed the burden of proof with respect to establishing the elements of "lost profits" on Petitioners. Clearly, the CAFC'S opinion did nothing of the sort, but instead merely stated that the Petitioners had argued that Respondents had purportedly failed to

sustain their burden of demonstrating that there were no acceptable substitute spark plug cleaners available. There was simply never any shift of the requisite burden to Petitioners. Neither did Respondents ever argue that it was Petitioners' burden to establish that there were "acceptable substitutes". On the contrary, Respondents consistently argued that the evidence presented at trial more than satisfied its burden of showing that there were no acceptable non-infringing substitute spark plug cleaners in the marketplace at the time of the infringement, with respect to the patents at issue. Indeed, as the Court of Appeals properly concluded, Petitioners failed to demonstrate that the District Court abused its discretion in denying their Motion for a New Trial on the issue of

whether the proper measure of damages was a "reasonable royalty" rather than "lost profits".

III. CONCLUSION

For the reasons set forth hereinabove the Petition for Writ of Certiorari must be denied in its entirety, since it hopelessly fails to set forth any compelling reasons whatsoever for the granting of such review. Instead the Petition only attempts to fabricate purported factual errors, incompetency, failure to follow Supreme Court precedent and case law deficiencies on the part of the Court of

Appeals for the Federal Circuit, where, in fact, none exist.

Dated: March 19, 1986

Respectfully submitted,

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